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**OFFICE OF PETITIONS**

In re Application of

Booth

Application No. 09/819,033

Filed: 23 August, 2000

Attorney Docket No. (None)

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ON PETITION

This is a decision on the petition filed on 19 February, 2004, to revive the above-identified application under 37 C.F.R. §1.137(b).

For the reasons set forth below, the petition under 37 C.F.R. §1.137(b) is **GRANTED**.

BACKGROUND

The record reflects that:

- Petitioner failed to reply timely and properly to the non-final Office action mailed on 23 May, 2003, with a reply due (absent a request and fee for extension of time) on or before Monday, 25 August, 2003;
- as a result, the application was deemed abandoned after midnight 23 August, 2003;
- Notice of Abandonment was mailed on 17 December, 2003;
- in his original petition filed on 22 December, 2003, under 37 C.F.R. §1.137(a), Petitioner alleged that severe illness in October 2003 was the cause of the abandonment—but presented no documentary evidence in support of the allegation, and so the petition was dismissed on 29 January, 2004;

- contemporaneously with filing of the original petition, Petitioner submitted a document which, he apparently intended and now intends as his reply to the 23 May, 2003, Office action in satisfaction of the "reply" requirement of the regulation;
- with the instant petition, Petitioner now has satisfied the "showing" and "statement" requirements.

### STATUTES, REGULATIONS AND ANALYSIS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).<sup>1</sup>

The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application under this congressional grant of authority.

The language of 35 U.S.C. §133 and 37 C.F.R. §1.137(a) is clear, unambiguous, and without qualification: the delay in tendering the reply to the outstanding Office action, as well as filing the first petition seeking revival, must have been unavoidable for the reply now to be accepted on petition.<sup>2</sup> Delays in responding properly raise the question whether delays are unavoidable.<sup>3</sup> Where there is a question whether the delay was unavoidable, Petitioners must meet the burden of establishing that the delay was unavoidable within the meaning of 35 U.S.C. §133 and 37 C.F.R. §1.137(a).<sup>4</sup>

And the Petitioner must be diligent in attending to the matter.<sup>5</sup> Failure to do so does not constitute the care required under Pratt, and so cannot satisfy the test for diligence and due care.

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<sup>1</sup> 35 U.S.C. §133 provides:  
**35 U.S.C. §133 Time for prosecuting application.**  
Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Commissioner in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

<sup>2</sup> Therefore, by example, an unavoidable delay in the payment of the Filing Fee might occur if a reply is shipped by the US Postal Service, but due to catastrophic accident, the delivery is not made.

<sup>3</sup> See: *Changes to Patent Practice and Procedure, Final Rule Notice*, 62 Fed. Reg. at 53158-59 (October 10, 1997), 1203 Off. Gaz. Pat. Office at 86-87 (October 21, 1997).

<sup>4</sup> See: *In re Application of G*, 11 USPQ2d 1378, 1380 (Comm'r Pats. 1989).

<sup>5</sup> See: *Diligence in Filing Petitions to Revive and Petitions to Withdraw the Holding of Abandonment*, 1124 Off. Gaz. Pat. Office 33 (March 19, 1991). It was and is Petitioner's burden to exercise diligence in seeking either to have the holding of abandonment withdrawn or the application revived. See 1124 Off. Gaz. Pat. Office *supra*.

(By contrast, unintentional delays are those that do not satisfy the very strict statutory and regulatory requirements of unavoidable delay, and also, by definition, are not intentional.<sup>6</sup>))

Petitioner has satisfied the petition, fee, reply and statement requirements of the regulation.

Accordingly, in view of the record, the petition as considered under 37 C.F.R. §1.137(b) hereby is **granted**.

The instant application is being returned to Technology Center 3600 for further processing.

Telephone inquiries concerning this decision may be directed to the undersigned at (703) 305-9199.



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<sup>6</sup> Therefore, by example, an unintentional delay in the reply might occur if the reply and transmittal form are to be prepared and/or deposited for shipment by the US Postal Service, but other pressing matters distract one's attention and the mail is not timely prepared and/or deposited for shipment.